IN THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

Case number: FAB 13/2017

In the appeal of:

AUDENBERG VERSEKERING MAKELAARS BK	First Appellant
TOBIAS VAN ZYL	Second Appellant
And	
HANNES WATERBOER	Respondent

Appeal panel: LTC Harms (chair), Mr Z Mabhoza and Mr J Damons

For the appellant: Adv S Botha

No appearance for the respondent

Hearing: 27 February 2018

Summary: Appeal against determination by the FAIS Ombud – fairness of procedure – expedition required – negligence – determination of damages

JUDGMENT

1. This is an appeal against a determination by the Ombud for Financial Service Providers in which the appellants were ordered to pay to the respondent, the complainant, the amount of R215 000.00 jointly and severely. In addition, the appellants have to pay interest at the rate of 10.25% from 1 June 2013 to date of final payment.
2. The determination was made by the Ombud in terms of section 28 of the Financial Advisory and Intermediary Services Act 27 of 2002 ("the FAIS Act").

3. The first appellant, AUDENBERG VERSEKERING MAKELAARS CC, is a licensed financial services provider, and the second appellant, TOBIAS VAN ZYL, is a key individual and representative of the former. They were the financial service providers of the complainant, Mr HANNES WATERBOER.
4. The complainant was advised by the appellants to invest in a public property syndication, City Capital SA Property Holdings Ltd. The complaint was that the investment had lost much of its value and that promised dividends were not paid. The complainant asked for the difference between the amount invested, which was R215 000, and the value of the investment, which he stated was R79 857. His claim was, accordingly, for R135 143. The Ombud nevertheless awarded him the full amount of the investment.

DUTIES OF THE FAIS OMBUD

5. It is unfortunate that this Board has to revisit this issue but the facts of the case require it.
6. In terms of sec 20(3) of the FAIS Act, the objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances.
7. In this matter the Ombud failed to deal with the matter expeditiously or in a procedurally fair manner.
8. As to expedition, the complaint was lodged on 28 April 2010. In response, the appellants addressed the issues raised on 29 July 2010. They followed this up with further letters, the last being of 5 May 2011.

9. The first action by the Ombud was on 8 January 2014, when the office informed the complainant that there was a delay in processing the complaint as a result of the uncertainties created by the decision of this Board in the Sharemax matter and the Ombud's decision to appeal that decision.

10. The first problem with the letter is that the issues in the Sharemax matter had nothing to do with the issues in this case. The excuse was accordingly not a valid excuse.

11. The second problem is that the Ombud did not inform the appellants that the matter was still pending and the appellant had good reason to assume that the matter had died a natural death.

12. The same happened with the next letter from the Ombud of 19 May 2015. Once again, the appellants were kept in the dark.

13. The first intimation the appellants had that the matter was alive was after a silence of four years – on 24 June 2015, when the Ombud wrote to the appellants. The appellants provided the facts requested on 6 July 2015 and on 15 September 2016 the determination was made.

14. To add insult to injury, it took the Ombud ten months to deal with the application for leave to appeal.

15. That brings us to the question of procedural fairness. It is apparent that the Ombud must have been in telephonic or other contact with the complainant shortly before the determination. The new allegations of the complainant were not put to the appellants and do in any event not appear from the record. This amounts to a basic denial of justice.

16. Some of the information unilaterally obtained found its way into the determination. Examples are that the money invested had come from the complainant's pension fund proceeds (para 11 of the determination); that the appellants had advised the complainant that the type of investment was stable (para 28); that it was common cause that the complainant had not seen a cent of his money and that no dividend had been paid (para 30 – the complainant had received two recent dividends); that the facts set out in para 45 'cannot be disputed' (they can and were in the application for leave to appeal and the complainant in this letter to this Board admits for instance that he is still employed); and that it is common cause that that no investment was made in Liberty (para 57).

17. In respect of the appellants' 'suggestion' (it was in fact an allegation) that City Capital was back on track, the Ombud said that this was not supported by documentation and that the allegation was irresponsible. The Ombud relied on the fact that the company had been liquidated during 2009.

18. The problem with the Ombud's findings in this respect (para 67) is that the Ombud failed to have regard to the fact that the company was for a while under provisional liquidation and has long since been trading. The Ombud simply failed to follow up or test the information that came from the appellants, creating the impression that whatever a complainant says must be true and what the FSP says must be untrue.

19. This is evidenced by the long debate in the determination about the investment profile of the complainant. The appellants had said that it was moderate and not conservative. The Ombud said that the appellants based their contention on the scoring of the risk

profiling exercise. It is correct that the scoring produced a 'moderate' risk profile but the fact of the matter is that the complainant classified himself as a moderate investor (p 46 of the record) and his allegation to the contrary in his complaint was untrue, and the debate about the scoring system was misplaced and unnecessary.

20. This is not the first instance where the Appeal Board had to point to the failure of natural justice in the office of the Ombud and about the unjustifiable delays in processing matters. Failure of the office of the Ombud to comply with its statutory duties may in an appropriate case lead to the setting aside of a determination to the detriment of complainants.

BREACH OF MANDATE

21. The duty of an FSP is to provide financial advice without negligence. In this case, the appellants advised the complainant to invest in a public property syndication company, City Capital SA Property Holdings Ltd. It is common cause that the company did not issue a disclosure document as required. The requirement was explained in ***Dulce Vita CC v van Coller and Others*** (192/12) [2013] ZASCA 22; [2013] 2 All SA 646 (SCA) para 7:

> On 30 March 2006 the Minister of Trade and Industry, acting in terms of s 12(6) of the Business Practices Act published Notice 459 of 2006 (Notice 459) in Government Gazette No 28690 in which two 'business practices', as defined in the Notice, were declared unlawful with effect from 30 March 2006 and persons were directed to (a) refrain from applying the unfair business practices and (b) refrain at any time from applying the unfair business practices.

The business practice relevant in this case was defined as–

> 'the business practice whereby the prescribed information, in part or otherwise, as stipulated in annexure "A" is withheld by promoters or their representatives from investors or potential investors in public property syndication schemes';

A 'public property syndication scheme' was defined as-

> 'the assembly of a group of investors invited, by word of mouth or through the use of electronic and print media, inter alia, radio, television, telephone, newspaper and magazine advertising, brochures and direct mail, to participate in such schemes by investing in entities, which could be companies, close corporations, trusts, partnerships or individuals, whose sole asset(s) are commercial, retail, industrial or residential properties, and where investors share in the profits and losses in these properties and or enjoy the benefits of net rental growth therefrom through proportionate share of income';

and the 'prescribed information' meant–

> 'the prescribed information as stipulated in annexure marked "A".'

A 'promoter' included a company and its directors and all other persons who were actively involved in the forming and establishment of a public property syndication scheme. The Notice directed that promoters must

make available in a disclosure document the prescribed information (the details of which were set out in annexure 'A') to investors who invest in or intend to invest in public property syndication schemes. The Notice also provided that any person who did not comply with the requirements of the Notice would commit a criminal offence and would be liable on conviction to a fine not exceeding R200 000 or to imprisonment for a period not exceeding five years, or to both that fine and that imprisonment.

22. City Capital misled the appellants and the public by representing that a 'prospectus' was not required and even had the temerity to warn against the dangers of a registered prospectus. It is true that a prospectus as defined in the Companies Act of 1973 was not required but a disclosure document in terms of the regulation was.

23. The appellants, in advising the complainant, relied exclusively on the advertising material provided by the company and the Ombud was thus correct in concluding that the appellants were not able to appreciate the risk involved in the investment.

24. In the recent judgment of ***Oosthuizen v Castro*** (2858/2012) [2017] ZAFSHC 163; [2017] 4 All SA 876 (FB) the court quoted with approval the following from ***Durr v Absa Bank Ltd and Another*** (424/96) [1997] ZASCA 44; [1997] 3 All SA 1 (A):

> Either he had to forewarn the [clients] where his skills ended, so as to enable them to appreciate the dangers of accepting his advice without more ado, or he should not have recommended [the investment]. What he was *not* entitled to do was to venture into a field in which he

professed skills which he did not have and to give them assurances about the soundness of the investments which he was not properly qualified to give.

QUANTIFICATION

25. We have considered the other submissions made on behalf of the appellants and, with due respect to counsel, the only point of merit relates to quantification. We have already pointed out that the Ombud made unjustifiable assumptions against the appellants and failed to investigate the matter properly. We agree with counsel that to refer the matter back to the Ombud at this late stage cannot be justified. We have to do the best we can in fairness to both parties. We accordingly decided to adopt the general approach of courts in assessing damages as discussed in De Klerk v Absa Bank Ltd and Others (176/2002) [2003] ZASCA 6; [2003] 1 All SA 651 (SCA) – do the best you can with the available material.

26. In this regard we take cognisance of the claimant's claim as submitted, namely for the difference between the amount invested and the value of the investment. The Ombud without any investigation found that the value of the investment is nil. The appellants say that the investment has value but we cannot quantify it on the papers. Instead of having the Ombud redo the exercise, a fair way to solve the problem is to order payment of the invested amount against cession or transfer of the investment and all dividends paid or payable after the date of this decision to the appellants. In such a manner the complainant will get what he asked for namely the difference between the

cost of the investment and its value; and the appellants will not lose more than what they say is the loss.

27. The complainant, in a letter to the Appeal Board of 13 November 2017, asked for repayment of the full investment and payment of the envisaged annual growth which had not materialised. If the complainant was dissatisfied about the determination, he had to apply for leave to appeal and appeal. He did not do so. In the absence of a cross-appeal, additional relief cannot be granted by the Appeal Board.

28. As to interest, the Ombud determined that it had to be paid as from 1 June 2013, i.e., three years after the lodging of the complaint. She probably took into account the delay in her office. There is no reason why we should interfere with her decision.

29. In the result, the appeal is upheld to the extent that payment of the capital sum is to be against cession and transfer of all the complainant's rights to and in respect of his investment in City Capital SA Property Holdings Ltd and any of its subsidiaries, and the appeal is otherwise dismissed.

30. For the sake of good order, the determination of the Ombud is replaced with the following:

A. The complaint is upheld.

B. Appellants are ordered to pay to complainant, jointly and severally, the sum of R215 000 against cession or transfer to the appellants of the investment and all dividends paid or payable after the date of this decision.

C. Appellants are also ordered to pay interest on R215 000 at the rate of 10.15% from 1 June 2013 to date of payment.

Signed on behalf of the Appeal Board Panel

LTC Harms (Chair)